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Supreme Court, U.S.
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No. 92-1668

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

S. R. WITKOWSKI, WARDEN, et al.,
Petitioners,

v.

LEWIS D. GOLDSMITH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the court of appeals, viewing the state court trial record in the light most favorable to the petitioners and treating applicable South Carolina law as controlling its inquiry, erred when it granted the writ of habeas corpus upon finding that no rationale juror could have found the essential elements of the crimes charged against respondent beyond a reasonable doubt?

2. Did the court of appeals err when it granted the writ because the prosecutor elicited highly improper testimony that no juror could conceivably ignore despite the fact that the evidence was stricken and the jury was instructed to disregard it?

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REASONS FOR DENYING THE PETITION

1. Introduction.

The decision below presents no significant issue that would justify plenary review by this Court. Rather, the court below applied established precedent to the facts of this case when it (1) applied this Court's decisions in Jackson v. Virginia, 443 U.S. 307 (1979), and Wright v. West, 112 S. Ct. 2482 (1992), to evaluate Goldsmith's challenge to the sufficiency of the evidence supporting his South Carolina convictions and (2) applied this Court's decision in Greer v. Miller, 483 U.S. 756 (1987), to assess whether a curative instruction, directing the jury to disregard stricken testimony, was adequate to protect Goldsmith's right to a fundamentally fair trial. The determinations that the evidence was insufficient and that Goldsmith was also denied fundamental fairness do not warrant review by this Court. There is no conflict cited here with other circuit decisions and the claim that the ruling below is inconsistent with prior decisions of this Court, See Sup. Ct. R. 10, is insupportable.[1]

Petitioners themselves acknowledge that they are asking this Court to examine the particular facts of this case and that "this Court does not generally grant certiorari to review evidence and

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[1] The dissent below perceived no conflict with the decisions of this Court or any other jurisprudential issues. The focus of the dissent centered squarely on the evaluation of the peculiar facts of this case and whether the court below "failed to take the evidence in a light most favorable to the State . . . ." Pet. App. 30.

discuss specific facts." Pet. 15. The Court should not do so here.

It also bears mention that there is no conflict created between South Carolina decisions and the decision below except for the disagreement, specific to this case, whether these peculiar facts establish constitutional violations. In particular, petitioners' claim that the substantive law of South Carolina of constructive possession has been "rewrit[ten]," Pet. 29, is sheer hyperbole. The decision below has no effect, beyond this one case, on South Carolina law. Tellingly, petitioner and the court below have never even hinted that the ruling in this case announced anything that would require consideration of the Teague v. Lane, 489 U.S. 288 (1989) bar on announcing new rules in habeas cases and petitioner makes no Teague claim here.

2. **The constitutional sufficiency of the evidence was determined under appropriate standards.**

The court below properly applied the test enunciated in Jackson v. Virginia and reiterated in Wright v. West in reviewing Goldsmith's constitutional claim of evidentiary insufficiency. The court considered whether "*any* possible rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Pet. App. 8 (quoting Jackson, 443 U.S. at 319). It faithfully followed Jackson's dictate to review the evidence "with explicit reference to the substantive elements of the criminal offense as defined by state law," Jackson, 443 U.S. at 324 n.16, and to assess the evidence "in the light most

favorable to the prosecution," id. at 319. See Pet. App. 8-9, 16-17. The court below concluded that no rational juror could have found that Goldsmith had constructive possession or participated in a conspiracy based upon his mere presence in an apartment and his knowledge of drugs and drug paraphernalia. Pet. App. 14-16, 17-18. The ruling is case specific and of no peculiar significance to other cases.

a. Possession with intent to distribute

The court below followed Jackson and first looked to South Carolina law to determine the elements of the offense. Pet. App. 8-13. Under South Carolina law, "[c]onviction of possession of [drugs] requires proof of possession--either actual or constructive, coupled with knowledge of its presence." State v. Hudson, 284 S.E.2d 773, 774-75 (S.C. 1981); State v. Brown, 227 S.E.2d 674, 676 (S.C. 1976). To prove constructive possession, the State must prove more than "mere presence[.] . . . [T]he State must show defendant had dominion and control over the thing allegedly possessed or had the right to exercise dominion and control over it." State v. Tabory, 196 S.E.2d 111, 113 (S.C. 1973).[2] The court below adhered to this definition when it

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[2] See also State v. Kimbrell, 362 S.E.2d 630, 632 (S.C. 1987) ("[M]ere presence, where the drugs are present, would not be sufficient to convict, without more.") (internal quotations omitted); State v. Brown, 227 S.E.2d 674, 677 (S.C. 1976) (reversing conviction where evidence of defendant's presence in car containing eight pounds of marijuana "fail[ed] to make a jury issue of [his] dominion and control of the marijuana"); State v. Ellis, 207 S.E.2d 408, 413 (S.C. 1974) (reversing conviction where, despite fact that defendant resided in apartment in which heroin sales were made and may have been present at the time of

(continued...)

stated, "A person has constructive possession of drugs if he has knowledge of the drugs *and* dominion and control, or the right to exercise dominion and control, over the drugs."[3] Pet. App. 8-9 (citing State v. Ellis, 207 S.E.2d 408, 413 (1974)).

The court below assessed the evidence under applicable South Carolina standards. The court below found that the State

> presented only an evidentiary picture of an accused sitting at a table laden with narcotics and narcotic paraphernalia in an apartment where other drugs and paraphernalia were later discovered. . . . At best, the State's evidence showed Goldsmith's presence in an unknown person's apartment and his knowledge of drugs and drug paraphernalia in the apartment.

Pet. App. 13-14. The court correctly recognized that while a jury could properly infer knowledge from such circumstances, there was virtually no evidence from which a jury could infer dominion or control. Pet. App. 9-10.

Because the State failed to prove dominion and control, the court below ruled that the prosecution had failed to prove a necessary element of the offense and, thus, had presented insufficient evidence to rationally convict Goldsmith for possession. Pet. App. 15. In doing so, the court below was following this Court's established precedent that "a conviction based upon a record wholly devoid of any relevant evidence of a

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[2](...continued)
those sales, there was no evidence that defendant had dominion and control over the drugs).

[3] Nor was the appropriateness of using this legal standard disputed by the dissent. See Pet. App. 29-30.

crucial element of the offense charged is constitutionally infirm." Jackson, 443 U.S. at 314.

There is no merit to Petitioners' claim that the panel has "rewrit[ten]" the substantive law of constructive possession in South Carolina. Pet. 29. This decision is faithful to and fully respects South Carolina substantive law. Indeed, the proposition that presence and knowledge of drugs is not alone necessarily adequate to convict as a matter of law is virtually universally recognized in habeas and other contexts.[4]

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[4] Other courts have often been called on to determine whether presence at a drug scene establishes guilt or mere presence. In each instance, as here, the outcome is based on the specific facts presented. E.g., United States v. Pardo, 636 F.2d 535, 549 (D.C. Cir. 1980) ("One principle of law firmly rooted in this circuit is that *mere presence at the scene of a drug transaction or mere proximity to drugs seized is not sufficient to establish guilt*. . . . [T]here must be something more than mere presence at the scene of a criminal transaction. There must be some action, some word, or some conduct that links the individual to the narcotics and indicates that he had some stake in them, some power over them. There must be something to prove that the individual was not merely an incidental bystander."); United States v. Garcia, 983 F.2d 1160, 1164 (1st Cir. 1993) ("Mere presence or association with another who possessed the contraband is .. insufficient to establish constructive possession."); United States v. Rios, 856 F.2d 493, 496 (2d Cir. 1988) ("It is true that mere presence at the location of contraband does not establish possession. . . . What is required is sufficient indicia of dominion and control."); Paez v. O'Lone, 772 F.2d 1158, 1159 (3d Cir. 1985) ("As a general proposition, it is improper to infer possession from the mere presence of the defendant at the location where the narcotics are found."); Harris v. Blackburn, 646 F.2d 904, 906 (5th Cir. 1981) (reversing district court's denial of habeas writ and holding that "while it can be inferred from [defendant's] presence in the car and from the location of the heroin in 'plain view' in the console that [defendant] had knowledge of the presence of drugs, it is clear that knowledge of the presence of drugs is insufficient to prove 'dominion' or 'control' over the drugs, and, therefore, is insufficient to establish 'possession'"); United States v. Requarth, 847 F.2d 1249, 1252 n.3 (7th Cir. 1988) (referencing (continued...)

[4](...continued)
jury instruction which directed "Mere presence in the vicinity of the controlled substance or mere knowledge of its physical location, standing alone, . . . does not constitute possession"); United States v. Wajda, 810 F.2d 754, 761 (8th Cir.) ("Factors including occupancy of the premises where the drugs are found, proximity to where the drugs are found, or association with the person or persons in possession of the drugs may raise the inference of constructive possession, but are insufficient of themselves to support a conviction. . . . In order for the evidence to be sufficient to sustain a conviction for possession, there must be some nexus linking the defendant to the drugs.") (citations omitted), cert. denied, 481 U.S. 1040 (1987); United States v. Hernandez, 876 F.2d 774, 778 (9th Cir.) ("Mere proximity to contraband, presence on property where it is found and association with a person or persons having control of it are all insufficient to establish constructive possession.") (internal quotation marks omitted), cert. denied, 493 U.S. 863 (1989); United States v. Batimana, 623 F.2d 1366, 1369 (9th Cir.) ("Mere proximity to the drug, mere presence, or mere association with the person who does control the drug is insufficient to support a finding of possession.") (citations omitted), cert. denied, 449 U.S. 1038 (1980); United States v. Rogers, 921 F.2d 1089, 1093 (10th Cir. 1990) ("[M]ere proximity to illegal drugs, mere presence on the property where they are located or mere association with persons who do control them, without more, is insufficient to support a finding of possession.") (internal quotation marks omitted), cert. denied, 111 S. Ct. 2812 (1991); United States v. Gardiner, 955 F.2d 1492, 1495 (11th Cir. 1992) ("[M]ere presence in the area of contraband or awareness of its location is not sufficient to establish possession.") (internal quotation marks omitted); United States v. Mieres-Borges, 919 F.2d 652, 659 (11th Cir. 1990) (holding that proximity of defendant to bales of cocaine was "insufficient as a matter of law to allow a finding of guilt beyond a reasonable doubt" for possession), cert. denied, 111 S. Ct. 1633 (1991).

State courts routinely hold that mere presence is insufficient to convict for possession. E.g., Menefee v. State, 592 So. 2d 642, 644 (Ala. Crim. App. 1991) ("[M]ere presence of the accused in a place where a controlled substance is found is not in and of itself evidence of possession.") (internal quotation marks omitted); Whipple v. State, 427 S.E.2d 101, 102 (Ga. Ct. App. 1993) ("A finding of constructive possession must be based upon some connection between the defendant and the contraband other than spatial proximity. Evidence of mere presence at the scene of the crime, and nothing more to show participation of a defendant in the illegal act, is insufficient to support a conviction.") (internal quotation marks omitted); Skelton v. State, 609 So. 2d 716, 717 (Fla. Dist. Ct. App. 1992)
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b. Conspiracy to distribute

Reviewing the evidence presented by the prosecution to support Goldsmith's conspiracy convictions, the court below again remained faithful to the Jackson analysis. South Carolina law defines a conspiracy as "a combination between two or more persons for the purpose of accomplishing a criminal or unlawful object or an object neither criminal nor unlawful by criminal or unlawful means." S.C. Code Ann. § 16-17-410 (Law. Co-op. 1985). The State must first prove the existence of a conspiracy either by "a formal express agreement" between the conspirators or "circumstantial evidence and the conduct of the parties." State v. Oliver, 267 S.E.2d 529, 530 (S.C. 1980).

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[4](...continued)
("Mere proximity to contraband is insufficient to establish constructive possession."); Enamorado v. State, 534 N.E.2d 740, 742 (Ind. 1989) ("[M]ere presence or association with another who actually possessed contraband is insufficient to show constructive possession."); State v. Bell, 566 So. 2d 959, 959 (La. 1990) ("It is settled . . . that '[t]he mere presence of someone in the area where the controlled dangerous substance is found . . . is insufficient to constitute constructive possession.'"); State v. Barber, 635 S.W.2d 342, 344 (Mo. 1982) (reversing conviction where evidence "established only that the defendant was discovered in a room with large quantities of controlled substances"); People v. Webb, 578 N.Y.S.2d 579, 580 (N.Y. App. Div. 1992) ("While . . . the defendant was found in the room where the marihuana was discovered, his mere presence was insufficient to establish that he exercised dominion and control over the marihuana, which is necessary to establish constructive possession . . . ."); City of Cincinnati v. McCartney, 281 N.E.2d 855, 856 (Ohio Ct. App. 1971) (holding that evidence of defendants "seated on chairs about six feet from the [marijuana] plants when the arresting officer entered the apartment in question" was insufficient to prove constructive possession of such plants); State v. Bradford, 808 P.2d 174, 177 (Wash. Ct. App.) ("[M]ere proximity is insufficient to show dominion and control. . . . [K]nowledge of the presence of the drug, without more, [is] also insufficient."), review denied, 815 P.2d 266 (Wash. 1991).

After the existence of a conspiracy is proven, a defendant's connection to the conspiracy, however slight, is required to convict the defendant of knowing participation in the conspiracy. State v. Sullivan, 282 S.E.2d 838, 843 (S.C. 1981). To prove participation, the State must present proof beyond mere presence or mere knowledge to show a defendant's membership in a conspiracy. See State v. Robinson, 412 S.E.2d 411, 413 (S.C. 1991) (reversing conviction where trial judge erroneously instructed the jury that mere presence or association with people who possess drugs is sufficient proof that defendant was a member of a conspiracy); Sullivan, 282 S.E.2d at 843 (reversing conviction for conspiracy where evidence proved "[m]ere association"); State v. Good, 417 S.E.2d 640, 643 (S.C. Ct. App. 1992) (upholding jury instruction for conspiracy and other offenses which directed, "Mere presence at the scene of a crime and knowledge that a crime is being committed are not sufficient to establish guilt unless [the jury] find[s] beyond a reasonable doubt that the defendant was a participant and not merely a knowing spectator."), [South Carolina] cert. granted (Dec. 8. 1992).

Applying the standard as defined by state law, Pet. App. 16-17, the court found that the State had presented no evidence to show the existence of a conspiracy, and even assuming that it

had, there was no evidence to show Goldsmith's participation.[5]

Pet. App. 17. The court reasoned,

> A reasonable juror could have believed Goldsmith was a user waiting to make a purchase, a friend of the owner or lessee of the apartment, or perhaps even an interloper. A conclusion, however, that Goldsmith was part of a conspiracy to distribute marijuana or cocaine, requires bridging an evidentiary gap with rank speculation.[6]

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[5] Petitioners make much out of the conduct of Goldsmith's codefendant, Cooper, who attempted to obstruct the police from entering the apartment pursuant to a valid search warrant. Pet. 25. Such conduct, while relevant to showing Cooper's guilt, is not rationally relevant to implicate Goldsmith in a conspiracy. See United States v. Evans, 970 F.2d 663, 674 (10th Cir. 1992) ("The best way to assess a defendant's intended involvement in a conspiracy is to examine the conspiracy from that defendant's point of view."), cert. denied, 113 S. Ct. 1288 (1993).

[6] Petitioners seize on the court's language that given the fact that Goldsmith was in an apartment with drugs, a reasonable juror could just as easily believed that he was a user waiting to make a purchase. Pet. App. 17. Petitioners' bald contention that this hypothesis is sufficient to rationally prove Goldsmith's participation in a conspiracy to distribute drugs is erroneous as a matter of law. Pet. 24. E.g., United States v. Morris, 836 F.2d 1371, 1374 (D.C. Cir. 1988) ("Governing law seems perfectly clear . . . that a buyer-seller relationship does not make out a conspiracy even if the item sold is one to be used illegally."); United States v. Meyers, 646 F.2d 1142, 1145 (6th Cir. 1981) (holding that proof of buyer-seller relationship, standing alone, was insufficient evidence to prove a conspiracy); United States v. Townsend, 924 F.2d 1385, 1394 (7th Cir. 1991) ("[E]vidence of a buyer-seller relationship, standing alone, is insufficient to support a conspiracy conviction."); United States v. Turner, 975 F.2d 490, 497 (8th Cir. 1992) ("[M]ere existence of a buyer-seller relationship is insufficient to prove a conspiracy."), cert. denied sub. nom Dowdy v. United States, 113 S. Ct. 1053 (1993); United States v. Fox, 902 F.2d 1508, 1514 (10th Cir.) ("[P]roof of the existence of a buyer-seller relationship, without more, is inadequate to tie the buyer to a larger conspiracy.") (internal quotation marks omitted), cert. denied, 498 U.S. 874 (1990); United States v. Revel, 971 F.2d 656, 660 (11th Cir. 1992) ("[M]ere buyer/seller relationship is inadequate to link individuals to a conspiracy . . . ."), cert. denied sub. nom Pullam v. United States, 113 S. Ct. 1665 (1993), and cert. denied, 113 S. Ct. 1828 (1993).

Pet. App. 17-18. Therefore, the court concluded that Goldsmith's presence and knowledge of the drugs, standing alone, was constitutionally insufficient to convict him for conspiracy. Pet. App. 17. This decision is compelled given the elements of the crime of conspiracy in South Carolina law and is also jurisprudentially consistent with other authority across the country.[7]

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[7] E.g., United States v. Ocampo, 964 F.2d 80, 82 (1st Cir. 1992) (holding that "mere awareness" of criminal activity was insufficient evidence to prove membership in a conspiracy); United States v. Hyson, 721 F.2d 856, 862 (1st Cir. 1983) (holding that evidence of defendant's occupancy of the apartment with knowledge that hashish was being stored there was insufficient to sustain conviction for conspiracy); United States v. Soto, 716 F.2d 989, 991-92 (2d Cir. 1983) ("[Defendant's] mere presence at the apartment, even coupled with the knowledge that a crime was being committed there, is not sufficient to establish her guilt. Evidence tending to show knowing participation in the conspiracy is also needed. . . . [P]articipation in the conspiracies cannot be proven by presence alone.") (citations omitted); United States v. Leon, 739 F.2d 885, 892-93 (3d Cir. 1984) (noting that "presence alone" or "proximity alone" is insufficient to establish participation in a conspiracy); United States v. Sanchez, 961 F.2d 1169, 1180 (5th Cir.) (holding that evidence of defendant's knowledge of a conspiracy was insufficient where there was no evidence showing beyond a reasonable doubt that defendant participated in the conspiracy), cert. denied, 113 S. Ct. 330 (1992); United States v. Pearce, 912 F.2d 159, 162 (6th Cir. 1990) (holding that "mere presence" of defendants in house at time of police raid was insufficient evidence to support conspiracy convictions), cert. denied sub. nom Thorpe v. United States, 111 S. Ct. 978 (1991); United States v. Durrive, 902 F.2d 1221, 1225 (7th Cir. 1990) ("A defendant's mere knowledge of, approval of, association with, or presence at a conspiracy is insufficient to establish the participation element."); United States v. Hernandez, 986 F.2d 234, 236 (8th Cir. 1993) ("Mere presence at the location of the crime alone, even when coupled with knowledge of that crime, is not sufficient to establish guilt on a conspiracy charge."); United States v. Restrepo, 930 F.2d 705, 709 (9th Cir. 1991) ("It is clear that mere association with members of a conspiracy, or simple knowledge, approval, or acquiescence in the object or purpose of the conspiracy, without intention and agreement to accomplish a

(continued...)

Thus, there is no conflict with this Court's or any other courts' statements of the controlling law that could support a grant of certiorari here. Cf. Mobil Oil Corp. v. FPC, 417 U.S. 283, 292 (1974) (granting certiorari to determine whether the appellate court "misapprehended or grossly misapplied" the legal standard).

3. **The Case Specific Determination does not warrant review in this Court.**

Essentially, Petitioners are asking this Court to do little more than redetermine whether no rational jury could convict based on the evidence presented here. This exercise is not worthy of the Court's time. United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Here, there is no legal principle at stake, only a disagreement whether the particular facts of this case are constitutionally adequate to prove guilt. This Court has no reason to revisit the factual record to make its own

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[7](...continued)
specific illegal objective, is not sufficient to make one a conspirator.") (internal quotation marks omitted); United States v. Coyote, 963 F.2d 1328, 1331 (10th Cir. 1992) ("Proof of knowledge of illegal activity or mere presence at the crime scene, standing alone, are not sufficient to establish a conspiracy beyond a reasonable doubt."); United States v. Butler, 792 F.2d 1528, 1536 (11th Cir.) ("[M]ere knowledge of the conspiracy in association with the conspirators is insufficient evidence to support a conspiracy conviction.") (internal quotation marks omitted), cert. denied sub. nom Waites v. United States, 479 U.S. 933 (1986).

determination of whether the evidence establishing presence was also adequate to establish dominion and control.

4. **There is no reason to reconsider the standard of review for evidentiary sufficiency claims.**

Alternatively, Petitioners suggest that this Court essentially overrule Jackson and much of the Court's habeas jurisprudence and require deferential review of state court decisions applying law to facts. Pet. 29-30. This case is a particularly inappropriate one to undertake this type of review. In the proceedings below, Petitioners embraced the Jackson standard with no hint that any other approach be considered. Petitioners, in fact, conceded that "[t]he substantive law of South Carolina presents the *threshold parameters* for sufficiency of the evidence inquiry." Brief of Appellees at 8, Goldsmith v. Witkowski, 981 F.2d 697 (4th Cir. 1992) (No. 91-7578) (emphasis added). This circuit court brief was submitted *after* this Court posed the question for briefing in Wright v. West.[8] Because Petitioners have never challenged the applicability of the Jackson standard of review, and the courts below never addressed it, such a request is inappropriate here. See Delta Airlines v. August, 450 U.S. 346, 362 (1981) (ruling that question presented

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[8] On December 18, 1991, this Court requested additional briefing on the question of whether a federal habeas court should review the state court's application of law to facts de novo or whether it should give deference to the state court's determination. Wright v. West, 112 S. Ct. 672 (1991). Petitioners' brief was filed in the court below on April 20, 1992.

in petition for certiorari but not raised in the court of appeals was not properly before the Court); Youakim v. Miller, 425 U.S. 231, 234 (1976) ("Ordinarily, this Court does not decide questions not raised or resolved in the lower court.").

Indeed, a comparison with Wright is indicative of why this case is neither worthy of review nor appropriate for reconsidering the standard of review. In Wright, at issue was a common law inference, recognized in Virginia as well as many other jurisdictions, that the unexplained possession of recently stolen goods necessarily is sufficient evidence as a matter of law to prove that the possessor committed larceny. Wright, 112 S. Ct. at 2485. The Fourth Circuit rejected this deeply rooted common law proposition when it granted habeas relief and held that the defendant's possession of stolen goods was legally insufficient to prove larceny in that case. Id. at 2486. Thus, the Wright circuit court decision had significant precedental impact on state law beyond the case being decided. Indeed, unlike this case, a major issue in the circuit and here in Wright was whether the circuit ruling violating the Teague v. Lane, 489 U.S. 288 (1989) proscription against pronouncing new rules on habeas review. No Teague issue has ever been raised in this case simply because it does not state a new rule of law.

Unlike Wright, the decision below has no implications for other cases. The decision below was rendered with reference to the specific facts of the case. Moreover, it is noteworthy that in contrast to Wright, in which twenty-five states joined as

amici in support of the petitioner at the certiorari stage,[9] *no* states have joined Petitioners at this stage of the proceedings. Petitioners' claim that the decision below will undermine state drug prosecutions, Pet. 14-15, must be evaluated in this context.

Finally, this case is an inappropriate vehicle to review broader standard of review principles. Unlike other forms of de novo review that require habeas courts to apply legal standards to differing factual situations, Jackson already has substantial deference built into its review standard. The Jackson standard

> gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. . . . [and] impinges upon 'jury' discretion *only to the extent necessary to guarantee the fundamental protection of due process of law.*

Jackson, 443 U.S. at 319 (emphasis added). Heightened deference to decisions made under the already deferential Jackson standard would be either redundant or would fundamentally alter the substantive guarantee promised by In re Winship, 397 U.S. 358 (1970), that no person shall stand convicted except on proof beyond a reasonable doubt.

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[9] *Amici* included the Attorneys General of Alabama, Alaska, Arizona, Connecticut, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maryland, Mississippi, Missouri, Montana, Nevada, New Jersey, North Carolina, Ohio, South Carolina, South Dakota, Utah, Vermont, and West Virginia. Brief of Amicus Curiae in Support of Petitioner at A-2 - A-3, Wright v. West, 112 S. Ct. 2482 (1992) (No. 91-542).

5. **The alternative holding below, that the introduction of highly prejudicial and inadmissible testimony at the state trial compelled federal habeas relief, is not an issue worthy of plenary review in this Court.**

Petitioners also ask the Court to grant certiorari to review the second basis for granting the writ of habeas corpus below, the finding that the jury "curative" instruction did not adequately protect respondent's right to a fair trial. Pet. 30-38. Here, there is no claim that the decision below conflicts with the decisions of other circuits, or that the decision is inconsistent with this Court's rulings, or that the decision "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." S. Ct. R. 10.1.(a). The question presented for review asks the Court to redetermine the question of whether or not a case-specific curative jury instruction was adequate to protect Goldsmith's right to due process after the State erroneously elicited prejudicial inadmissible testimony from its witness. Pet. App. 18-21. Even if the court below erred by "leisurely mischaracteriz[ing] the objected evidence" as Petitioners assert, Pet. 36, this Court is not an error correction court and this question is otherwise not worthy of further review.

Nor is there any case-specific error to be corrected here. Goldsmith was granted relief under the habeas corpus standard for reviewing the efficacy of cautionary instructions given after the introduction of inadmissible testimony. The court below applied

this Court's rule that an instruction directing the jury to disregard inadmissible evidence is presumed to cure any resulting prejudice unless "'there is an 'overwhelming probability' that the jury will be unable to follow the court's instructions, and a strong likelihood that the effect of the evidence would be 'devastating' to the defendant." Greer v. Miller, 483 U.S. 756, 766 n.8 (1987) (quoting Richardson v. Marsh, 481 U.S. 200, 208 (1987)). Pet. App. 19-20.

The inadmissible evidence that the jury was expected to disregard changed the case dramatically. It told the jury that the police had knowledge that Goldsmith would be in the apartment that they believed was being used to distribute drugs at a specific time. This provided evidence that Goldsmith was personally known to the police and also known to be linked with the apartment and the drug operation before the police even entered the apartment. The inadmissible evidence established that Goldsmith had the right to exercise dominion and control over the apartment and its contents. Thus, the statement filled in the missing pieces of the government's case which otherwise only placed Goldsmith in someone else's apartment with drugs in plain view. Pet. App. 20-21. No jury could be expected to disregard the assurance of a police witness that there was additional evidence of Goldsmith's guilt that was not otherwise before the jury.

The decision below is consistent with the standard set out in Greer. Very substantial doubts whether the State proved

possession with intent to distribute and conspiracy were eliminated by this prejudicial testimony. Because the inadmissible evidence was the most damning evidence of guilt presented to the jury and filled in the "missing link[s]" of evidence that the State was otherwise unable to provide, Pet. App. 20-21, no jury could disregard it. In a case in which the State's evidence was tenuous at best and the punishment imposed so severe,[10] due process at least requires that Goldsmith be retried before an untainted jury that can fairly evaluate this case.

Finally, there is one question concerning the standard of reversal used below which should be addressed. The court below, without discussion, applied both the general Chapman v. California, 386 U.S. 18 (1967), harmless error standard and the more specific "fundamental fairness" due process standard that controls review when there has been a curative instruction, see e.g., Greer, 483 U.S. at 766 n.7. Pet. App. 19-20. Applying both standards, the court below ruled that the introduction of the inadmissible testimony was not harmless error with regard to the possession and conspiracy convictions. Pet. App. 19-21. Earlier this Term, however, this Court decided Brecht v. Abrahamson 123 L. Ed. 2d 353 (1993), and held that Kotteakos v.

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[10] Goldsmith received concurrent sentences of (1) twenty years and a $20,000 fine for possession of marijuana with intent to distribute; (2) ten years for conspiracy to distribute marijuana; (3) twenty years and a $50,000 fine for possession of cocaine with intent to distribute; and (4) ten years for conspiracy to distribute cocaine. Pet. App. 3.

United States, 328 U.S. 750 (1946), not Chapman, controls harmless error on habeas review of "trial error."[11] The test under Kotteakos is whether the error "had substantial and injurious effect or influence in determining the jury's verdict." Kotteakos, 328 U.S. at 776. Chapman is more exacting on the government than Kotteakos because it requires retrial if there is a reasonable possibility that the error contributed to the verdict. Chapman, 386 U.S. at 24.

Nevertheless, erroneous use of Chapman below is irrelevant because it was only one of two reversal standards employed by the court. The court below correctly used the Greer due process "fundamental fairness" standard that applies when a curative instruction is given. The Greer standard requires the habeas petitioner to demonstrate an overwhelming probability that the curative instruction cannot be followed. This standard affords the State greater protection than Kotteakos and remains the correct standard to use, post-Brecht when a curative instruction is involved. Thus, the use of Chapman by the court below had no effect on the outcome since the court also found a "fundamental fairness" due process violation under the more exacting prejudice

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[11] The use by the court below of two reversal standards can be explained by the fact that there were two issues raised: (1) Whether Goldsmith was denied his right to confrontation; and (2) whether the error occasioned thereby was cured by curative instruction given by the court below. The latter issue is controlled by the Greer standard, the former by Kotteakos as of the Brecht decision.

standard that was and is the appropriate test to use when there has been a curative instruction.[12]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

Respectfully submitted,

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[12] That the reference to Chapman below was irrelevant to the outcome is underscored by the fact that Petitioners have not questioned the standard employed by the court below. Rather, Petitioners argue that the court below erred because the "mandates of harmless error review set forth in Greer v. Miller, [citation omitted] were not carried out," Pet. 31, but make no claim that the court below used an incorrect standard to resolve the issue of prejudice. Under these circumstances and because no issue is presented for review, there is no need to consider whether the reference to Chapman is meaningful.

No. 92-1668

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

S. R. WITKOWSKI, WARDEN, et al.,
Petitioners,

v.

LEWIS D. GOLDSMITH,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Certificate of Service

I, Steven H. Goldblatt, a member of the Bar of this Court, hereby certify that on this 1st day of June, 1993 three (3) copies of Respondent's Brief in Opposition were mailed first class, postage pre-paid to Donald J. Zelenka, Esq., Chief Deputy Attorney General, Office of the Attorney General, Rembert C. Dennis Building, P.O. Box 11549, 1000 Assembly Street, Columbia, South Carolina 29211, counsel for petitioners herein. I further certify that all parties required to be served have been served.

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